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Chairman: Mr. Gómez Robledo ..... (Mexico)
later: Mr. Onisii (Vice-Chairman) ..... (Romania)

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The meeting was called to order at 11.05 a.m.

Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (A/61/10)

1. **The Chairman** expressed the Committee's appreciation of the contribution made by the International Law Commission to the progressive development of international law and its codification in accordance with Article 13 of the Charter of the United Nations. Its current report was extensive and very substantive and provided an excellent basis for a stimulating discussion.

2. **Mr. Pambou-Tchivounda** (Chairman of the International Law Commission), introducing the report of the International Law Commission (A/61/10), said that the Commission relied on the Sixth Committee for advice from Governments and information on State practice that was not otherwise readily available. That was particularly the case for new topics involving emerging practices not easily accessible to the public. The Commission's success in the codification of international law, therefore, depended largely on the support it received from the Committee.

3. Speaking first on the non-substantive chapter of the report, chapter XIII, he said that the topic "Expulsion of aliens" would be considered in 2007. The topics that the Commission had endorsed for inclusion in its long-term programme were: "Immunity of State officials from foreign criminal jurisdiction"; "Jurisdictional immunity of international organizations"; "Protection of persons in the event of disasters"; "Protection of personal data in transborder flow of information"; and "Extraterritorial jurisdiction". It had decided to request the views of Governments on the desirability of further work on the topic "The most-favoured-nation clause".

4. Since its last report, the Commission had received a visit from Judge Rosalyn Higgins, President of the International Court of Justice, and had been cooperating with other bodies, including the Inter-American Juridical Committee, the Asian-African Legal Consultative Organization, the European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law.

5. The Commission attached great importance to the International Law Seminar, which was held annually in Geneva during the meetings of the Commission and enabled young lawyers, particularly those from developing countries, to familiarize themselves with the Commission's work and the activities of international organizations with headquarters in Geneva. It expressed its appreciation to those Governments that had contributed to the Seminar and urged Governments to provide financial assistance as soon as possible. A question of continuing concern to the Commission was that of honorariums, which affected the work of Special Rapporteurs; it urged the General Assembly to reconsider the matter with a view to their restoration.

6. He concluded his remarks on chapter XIII by expressing the Commission's appreciation for the high quality and competence of its secretariat, the Codification Division of the Office of Legal Affairs. The importance of the Division's role lay in the fact that it dealt with both the substance of the Commission's work and the procedural and technical aspects of servicing. Since the Division also served as the secretariat of the Sixth Committee, it was an invaluable and irreplaceable link between the two bodies and provided a high-quality service that must be preserved. In that regard, the Commission was indebted to the Division for the memorandum entitled "Expulsion of aliens" (A/CN.4/565) and for the Commission's new website, which constituted an invaluable research tool.

7. Turning to chapter IV, "Diplomatic protection", he said that the Commission had adopted on second reading the entire set of draft articles, together with commentaries. The first-reading structure of the draft articles had been retained, with two articles merged and one new draft article added. Draft article 1 had been reformulated to omit the reference to the State adopting in its own right the cause of its national and to focus instead on the responsibility of the injuring State. The reformulation reserved the question as to whether the State was acting in its own right or that of the individual or both. Draft article 2 was adopted as formulated on first reading. As to draft article 3, the first-reading text had been retained, with some additional precision. The Commission had also retained draft article 4 largely as adopted on first reading, with some technical amendments.

8. A number of amendments had been made to the new version of draft article 5, on the continuous nationality of a natural person. First, the nationality in

question had to remain that of the claimant State continuously from the *dies a quo* to the *dies ad quem*, whereas the first-reading version had merely required such conformity of nationality at both those points. To ease the claimant State's burden of proving continuity over what could be a substantial period of time, the Commission had included a rebuttable presumption in favour of continuity, if the relevant nationality existed at the two crucial dates. The Commission had decided that the *dies ad quem* should be the date of the official presentation of the claim, rather than the date of the resolution of the claim, since State practice provided insufficient support for the latter. Furthermore, it had been held that it was illogical to base the admissibility of a claim on whether the relevant nationality existed at the time of the settlement of the claim. Apart from some minor drafting improvements, the other main change had been the inclusion of a new paragraph 4 to cover situations in which the individual had acquired the nationality of the respondent State after the date of the official presentation of the claim.

9. Draft articles 6, 7 and 8 were largely the same as those adopted on first reading, apart from the insertion in draft article 8, paragraph 2, of the phrase "in accordance with internationally accepted standards", which had been included in order to provide a broader standard encompassing people who would not otherwise fall within the ambit of the 1951 Convention relating to the Status of Refugees and its Protocol.

10. In chapter III of Part Two, draft articles 9 to 13 dealt with the nationality of legal persons. Draft article 9, on the State of nationality of a corporation, had been modified substantially in response to comments from Governments and Commission members. The new version clarified the question of the State which might be deemed the State of nationality of a corporation for the purpose of exercising diplomatic protection. The second sentence of the draft article was designed to address situations where the connection between the corporation and the State in which it had been incorporated was so slight that it would not justify giving priority to that State's exercise of diplomatic protection. That sentence therefore set forth the three cumulative criteria for establishing when the connection with the State of incorporation was too tenuous.

11. The changes to draft article 10 on the continuous nationality of a corporation largely mirrored those made to draft article 5. Paragraph 2 corresponded to draft article 5, paragraph 4.

12. Draft articles 11 to 13 had not elicited much opposition from Governments or within the Commission, and accordingly the second-reading version was substantially the same as the first-reading version apart from some minor drafting improvements.

13. The second-reading text of Part Three, entitled "Local remedies", had only two draft articles, as opposed to the three contained in the previous version, because the Commission had decided to merge the draft article 15 which had been adopted on first reading into draft article 14. Draft article 14, which laid down the general rule of the exhaustion of local remedies, generally echoed the first-reading formulation, apart from the inclusion of paragraph 3 consisting of the text of former draft article 15.

14. Draft article 15 of the second-reading text corresponded to the draft article 16 which had been adopted on first reading. The four provisions of the original text had become five, as the Commission had decided to split former subparagraph (c) into two. The Commission had recast subparagraph (a) to include a reference to "reasonable available local remedies" in order to answer the concern that the standard of a "reasonable possibility of effective redress", the wording adopted on first reading, was too open-ended. Subparagraph (c) provided for a "relevant" connection in order to cover situations such as those arising in the *Aerial Incident of 27 July 1955* (Israel v. Bulgaria) case, where it would be unreasonable to expect the individuals in question to have exhausted local remedies in a State with which they had no relevant connection. Subparagraph (d) reflected the second element in the first-reading version of subparagraph (c) and dealt with special circumstances, such as denial of entry, threats against the safety of an individual making it impossible for that person to bring a case before the local courts, or criminal conspiracies obstructing the instituting of proceedings.

15. Part Four, entitled "Miscellaneous provisions", contained the same provisions as those adopted on first reading, apart from some minor drafting adjustments, plus one new draft article. Draft article 16, which corresponded to the draft article 17 adopted on first reading, had been reformulated along the lines suggested by the Government of the Netherlands. Similarly, draft article 17 (draft article 18 of the first-

reading text) had been reworded to make it clear that, while the draft articles established general rules, special rules concerning or excluding diplomatic protection applied elsewhere. It was based on article 55 of the articles on responsibility of States for internationally wrongful acts adopted by the Commission in 2001. The Commission had decided to retain draft article 18 concerning the protection of ships' crews largely in the form adopted in the first-reading draft article 19.

16. Lastly, the Commission had adopted a new draft article 19, entitled "Recommended practice", which encouraged States, first, to exercise diplomatic protection, secondly, to consult injured persons on whether or not to exercise such protection and on the form of reparation to be sought, and thirdly, to transfer compensation obtained from the responsible State to the injured person. The use of the word "should" in the chapeau of the draft article and the latter's title emphasized the recommendatory nature of the provision.

17. The Commission recommended that the General Assembly should elaborate a convention on the basis of the draft articles and accompanying commentaries. Lastly, he drew attention to the contents of paragraphs 47 and 48 of the report.

18. Chapter V (International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)) contained a preamble and eight draft principles on the liability aspect of the topic, which completed the Commission's consideration of the subject as a whole. In that connection, he drew attention to paragraph 64 of the report. The draft principles were intended to be general and residual in character and were without prejudice to the application of rules concerning State responsibility. Their scope was the same as that of the draft articles on the prevention of transboundary harm from hazardous activities which had been adopted in 2001, and they thus dealt with primary rules. The same threshold of "significant damage" had been retained in order to trigger the operation of the draft principles. The latter did not address issues associated with the global commons, which, in the opinion of the Commission, had their own particular features requiring separate treatment.

19. The draft principles rested on a number of policy considerations. In the main, the activities covered by the draft principles were linked to socio-economic development. Their value in that respect had to be weighed against other societal values and the primary consideration that a victim should not alone bear the loss resulting from any harm which might have occurred. For that reason, compensation and response measures were essential components of the draft principles, which sought to attach liability primarily to the operator. Such liability would be without proof of fault and might be subject to limitations, exceptions and conditions. An accident involving hazardous activities might occasion such extensive loss that it would be necessary to have a practicable system of allocating it. Hence losses might be spread through supplementary funding schemes involving multiple actors, including the industry and the State, as appropriate.

20. The preamble placed the draft principles in the context of the Rio Declaration on Environment and Development, although prior provenance could be traced to the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment. It highlighted the two main concerns which had prompted the draft principles currently before the Committee, namely the need to put in place measures to ensure that anyone who suffered damage from transboundary hazardous activities was able to obtain prompt and adequate compensation and the need to take effective response measures to minimize the potential harm and loss from a particular incident.

21. Draft principle 1 basically embraced the same four criteria for identifying activities falling within the scope of the draft principles as had been employed in the draft articles on the prevention of transboundary harm from hazardous activities: the element of human causation, the element of risk, the element of extra-territoriality and the physical element. The commentary elucidated the meaning of the terms.

22. Draft principle 2, on the use of terms, was largely the same as that adopted on first reading, except that it also contained definitions of additional terms, such as "State of origin" and "victim". The threshold of "significant" damage had been retained. It was understood to refer to something more than "detectable" but not necessarily at the level of "serious" or "substantial". The definition of damage reflected the current practice followed in treaties and

domestic law of including damage to persons, property and the environment. The definition of "operator" remained a functional one.

23. Draft principle 3, entitled "Purposes", explained that the draft principles were essentially designed to encourage the award of prompt and adequate compensation to victims of transboundary harm and to preserve and protect the environment through mitigation, restoration or reinstatement. The definition of "victim" took in natural and legal persons as well as States. Practice indicated that States played a prominent role in pursuing claims for environmental damage. The extent to which it was possible to compensate for such damage must be determined in the light of the definition of the damage. Compensation could include the costs of reasonable measures to reinstate property or the environment, including natural resources and the costs of reasonable response measures.

24. Draft principle 4, entitled "Prompt and adequate compensation", was the cornerstone of the draft principles. It sought to operationalize the principle of prompt and adequate compensation through four interrelated elements supported in treaty practice and domestic legislation. First, each State should take measures to ensure that mechanisms were in place to facilitate prompt and adequate compensation for victims of transboundary damage from hazardous activities within its territory. Secondly, such a liability regime would include the imposition of liability on the operator without requiring proof of fault. The phrase "such liability should not require proof of fault" sought to capture a broad spectrum of designations used to describe contemporary doctrine imposing strict liability, among them: "liability without fault", "negligence without fault", "presumed responsibility", "fault per se", "objective liability" and "risk liability".

25. Thirdly, liability without proof of fault could be subject to conditions, limitations or exceptions, including, for example, exoneration if the damage was the result of an act of armed conflict, hostilities, civil war or insurrection or of a natural phenomenon. While such conditions, limitations or exceptions were part of the practice of States, the Commission wished to underline that they should not be inconsistent with the purposes of the draft principles as stated in draft principle 3. Fourthly, various forms of financial security, such as insurance, bonds or other financial guarantees, should be required in order to ensure the provision of prompt and adequate compensation. Such guarantees might include the establishment of second-tier supplementary funds, possibly from the industry concerned or from the State of origin.

26. Draft principle 5, "Response measures", sought to stress the importance of taking action immediately following the occurrence of an incident. Prompt response was an important element in the mitigation of damage. Members would recall that the text adopted on first reading grouped together a number of ideas in a single paragraph. In the new version currently before the Committee, the various levels of interaction that should take place upon the occurrence of an incident had been spelled out more specifically. The first three elements, namely, notification, response, and consultation and cooperation, concerned the role of the State of origin in spearheading response efforts. The other two, mitigation and assistance, applied to the States affected or likely to be affected by the damage, and to the States concerned, respectively.

27. Draft principle 6, entitled "International and domestic remedies", underscored the importance of both international and domestic compensation procedures. In contrast to the text adopted on first reading, it laid particular stress on the principle of equal access to domestic remedies, specifying the three constituent components of such access: equal access to administrative and judicial proceedings, application of the principle of non-discrimination, and access to information. Where feasible, information should be accessible free of charge or at minimal expense. The international claims settlement procedures to which the draft principle alluded might include, for example, mixed claims commissions or negotiations for lump-sum payments. The international component did not preclude the possibility that the State of origin might make a contribution to the affected State for the disbursement of compensation claims under a national procedure established by the affected State.

28. Draft principle 7, "Development of specific international regimes", built upon principle 22 of the Stockholm Declaration and principle 13 of the Rio Declaration and emphasized the need to conclude specific agreements concerning compensation, response measures and remedies. Irrespective of what States did at the national level to fulfil their obligations with regard to response measures and compensation, a more secure and consistent pattern of good practice would require international arrangements as well.

29. Draft principle 8, "Implementation", reaffirmed the importance of adopting legislative, regulatory and administrative measures to implement the draft principles. It also emphasized the principle of non-discrimination in their implementation.

30. The issue of international liability for injurious consequences arising out of acts not prohibited by international law had been on the Commission's agenda for more than 25 years. When it had completed the prevention aspects, the Commission had been of the view that, taking into account existing State practice, the draft articles on prevention lent themselves to codification and progressive development through a convention. In drawing up the draft principles, the Commission had focused on formulating a coherent set of standards of conduct and practice. It had not attempted to identify the current status of the various aspects of the draft principles in customary international law, and the way in which the principles were formulated was not intended to affect that question. The commentaries contained an explanation of the scope and context of each draft principle, as well as an analysis of relevant trends and possible options available to assist States in the adoption of appropriate national measures of implementation and in the development of specific international regimes. As noted in paragraph 63 of the report, in accordance with article 23 of its Statute, the Commission recommended that the General Assembly should endorse the draft principles by a resolution and should urge States to take national and international action to implement them.

31. **Mr. Duan** Jielong (China) congratulated the Commission on the adoption of the 19 draft articles on diplomatic protection. While viewing the text of the draft articles as positive on the whole, his delegation wished to emphasize that several principles should be followed in exercising the right of diplomatic protection. First, diplomatic protection was a right, not an obligation, of the State of nationality. Second, the State of nationality, in exercising diplomatic protection, must not encroach upon the territorial jurisdiction of the State where an injury had occurred and should respect its law. Third, citizens and legal persons outside their State of nationality should be primarily protected by the law of the State where an injury had occurred, with supplementary protection provided by the State of nationality; under no circumstances should protection provided by the State of nationality replace that provided by the law of the State where the injured person was located. Fourth, the State of nationality should ensure that any measures it took in exercising diplomatic protection were proportionate to the injury and should refrain from taking excessive measures. Fifth, diplomatic protection should be without prejudice to other applicable rules of international law, including those concerning consular protection, human rights protection, investment protection and the law of the sea.

32. In draft article 1, "Definition and scope", the definition rightly emphasized that diplomatic protection was to be provided against an internationally wrongful act of a foreign country. His delegation endorsed the recognition of that rule of customary international law and believed that the elements constituting an internationally wrongful act should include not only the commission of the act in violation of an international obligation but also the physical consequences caused by such an act.

33. As to draft article 4, "State of nationality of a natural person", his delegation agreed in principle with the definition that that article provided of the term "State of nationality" but noted that in international practice there were often cases of dual or multiple nationality. Many States, however, did not recognize more than one nationality, which meant that the identification of nationality must take into account the law of the States concerned other than the State of nationality. Therefore, he suggested that the following proviso should be added to draft article 4: "unless otherwise provided for in the law of the State where a natural person is located".

34. With respect to draft article 7, "Multiple nationality and claim against a State of nationality", while understanding the purpose and practical implications of the provision regarding predominant nationality, his delegation believed that there was no clear definition of "predominant nationality" in international law, and it was difficult to judge in practice. He therefore suggested that either the concept should be clearly defined or the principle of closest association should be followed in determining which State was entitled to exercise diplomatic protection.

35. Draft article 8 spelled out the conditions for diplomatic protection of a stateless person, which his delegation approved. However, as continuous nationality was a universal principle applicable to diplomatic protection of natural and legal persons, it should also

apply to stateless persons and refugees. Accordingly, he suggested that draft article 8 should be amended to provide that the exercise by a State of diplomatic protection in respect of stateless persons and refugees would be conditional on their continuous lawful and habitual residence in that State. His delegation also believed that, in determining what was to be construed as "continuous", the law of the State of current residence and universally accepted principles of international law should be taken into account along with the law of the State of legal residence of a stateless person or refugee in order to ensure that diplomatic protection would not be abused.

36. Draft article 12, "Direct injury to shareholders", was jurisprudentially problematic and required further study. First, there was no clear definition of "rights of shareholders" in international law, and such cases were very rare in international practice. Second, as protection of shareholders' interests was primarily embodied in the diplomatic protection regime in respect of their corporation, the draft article was inconsistent with the basic principles of corporate law and might easily lead to the abuse of diplomatic protection if additional protection were to be provided for shareholders over and above the diplomatic protection provided to the corporation. Third, with regard to the rights of shareholders as distinct from those of the corporation itself, the principle of diplomatic protection applicable to natural persons could be invoked, and there was thus no need for a specific provision on diplomatic protection of shareholders.

37. Since, in practice, universities that were funded and ultimately controlled by a State were a form of legal person, his delegation suggested that the following wording should be added to the commentary on draft article 13: "Universities funded and ultimately controlled by a State are also entitled to diplomatic protection".

38. As to the exceptions to the local remedies rule set out in draft article 15, to his understanding, the exception provided in subparagraph (a) covered situations in which certain matters were deemed non-actionable by the law of the State where an injury had occurred. The exception given in subparagraph (e) provided that the State alleged to be responsible for the injury had waived the requirement that local remedies be exhausted. As the waiving of that requirement would be a State act, he suggested that, to avoid any possible confusion, the wording of that subparagraph should be changed to read "the State alleged to be responsible has expressly waived..."

39. Finally, with regard to draft article 19, "Recommended practice", his delegation believed that the evolution of international human rights law had not changed the nature of diplomatic protection as a State right. The State had the right to decide whether and how to exercise diplomatic protection; there was no such thing as State obligation to exercise diplomatic protection. However, in exercising diplomatic protection, the State should take into account the rights of injured persons, including such questions as whether and how to provide injured persons with appropriate compensation.

40. Turning to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (chap. V.E) he wished to make three general comments. First, as part of the gradual development of international law in respect of State responsibility, the draft principles were of great theoretical and practical significance. Second, the application of the draft principles was general and residual in character. By "general" he meant that the draft principles were general principles to guide State practice; it fell to the States concerned to adopt by agreement concrete measures for their implementation. By "residual" he meant that, in application, particular or specific compensation arrangements would take precedence over the draft principles. Third, he supported the efforts to cast the draft principles as a declaration or a set of guidelines, or possibly a model law, not only for States to invoke and apply, but also to serve as a basis for concluding treaties in the future.

41. Regarding paragraph 1 of draft principle 4, it was his understanding that "prompt and adequate compensation" meant "fair and reasonable compensation". That was consistent both with the understanding of the purposes of the draft principles and their commentaries and with the principle of equity, reflecting the value orientation of the draft principles in striking a reasonable balance between protection of victims and protection of lawful economic activities by the relevant State.

42. Draft principle 4 established the principle of strict liability of the operator. His delegation agreed with that principle but also believed that some legal points in paragraph 2 needed to be further clarified. In particular, in the definition of "operator", "person"

should be defined as any natural or legal person. Additionally, while his delegation endorsed the imposition of primary liability on the operator, it suggested that other persons or entities that had participated in the hazardous activities should be held liable, too. The term "other person or entity" should therefore be clearly defined. Also, some exemptions should be spelled out. For example, the operator and the State of origin might be exempted from liability if, owing to force majeure, the State of origin and the operator had failed to avoid causing transboundary damage, despite having taken due diligence measures.

43. With respect to draft principle 4, paragraph 3, his delegation believed that if the operator or other person or entity could establish financial security, it would help victims to obtain fair and reasonable compensation. But establishing financial security depended, to a large extent, on the economic strength of the operator. It was still unrealistic in the current context to impose a requirement on States to make insurance available to all enterprises engaged in transboundary hazardous activities. His delegation reaffirmed its support for the allowance of "some flexibility for States", as mentioned in the commentary associated with that paragraph.

44. Draft principle 4, paragraph 4, required that, where appropriate, the State of origin should establish "industry-wide funds" for compensation at the national level. His delegation was of the view that such funds were not very common in States, especially developing States. To provide as many options as possible for transboundary damage compensation, it would suggest that an international fund should be established to cover the part of the damage which the operator's compensation was insufficient to cover, taking as a model the international funds set up to provide compensation for damage due to oil spills or nuclear incidents.

45. In connection with draft principle 4, paragraph 5, his delegation noted that some hazardous industries were currently being relocated from developed States to developing States. In such cases, it was obviously unfair to allocate residual liability for transboundary damage to the developing State alone. In his delegation's view, the State of nationality of a given enterprise and other States that benefited from its activities should share the loss in cases of transboundary damage.

46. Lastly, draft principle 6, "International and domestic remedies", spelled out different remedies, but their interrelationships were not specified. He suggested that relevant provisions should be worked out accordingly.

47. **Mr. Lammers** (Netherlands), after expressing general support for the draft articles on diplomatic protection, endorsed the Commission's recommendation that a draft convention should be elaborated on the basis of the draft articles. He reiterated his delegation's position that the clean-hands doctrine should not be included in such an exercise.

48. The Netherlands agreed with the Special Rapporteur that draft article 3 should be amended to read "the State of nationality is the State entitled to exercise diplomatic protection", as that formulation properly emphasized the bond of nationality between State and national which entitled the State to exercise diplomatic protection. With regard to draft article 5, paragraph 3, the Netherlands remained of the opinion that the wording "may not" (instead of "shall not") would be more in line with the general idea that diplomatic protection should protect against individual unfairness. Indeed, in paragraph (12) of the commentary on that article, "may not" was used in the same context.

49. With regard to draft article 8, paragraph (2) of the commentary rightly stated that the draft article was an exercise in progressive development of the law, as it departed from the traditional rule that only nationals might benefit from the exercise of diplomatic protection. The draft article was important in respect of refugees, who in most cases would otherwise be left unprotected.

50. Paragraph (4) of the commentary on draft article 14 referred to the remedies available to an alien that must be exhausted before diplomatic protection could be exercised, whereas, in earlier versions of the text, the commentary had referred to remedies that must be exhausted before a claim was brought. His delegation remained of the opinion that, in the case of diplomatic action stopping short of bringing an international claim, no prior exhaustion of local remedies was required.

51. In draft article 16, the words "under international law" should be deleted. Otherwise, the draft article might be taken to suggest that resort to national law was excluded. For example, *amicus curiae* letters, a

worthwhile instrument used in certain national jurisdictions, might be called into question.

52. His delegation firmly supported the inclusion of draft article 19 on recommended practice. Recommendatory language, though not a common feature of treaties, was not unknown. The draft article would support the position of injured individuals when they were subjected to significant human rights violations abroad.

53. Turning to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, he welcomed the completion of the text on second reading after many years of debate in the Commission. The persistence of the special rapporteurs had resulted in a text that was, in his delegation's view, conceptually well-founded in international law.

54. His Government supported the main thrust of the draft principles and agreed with the underlying notion that the question of international liability for transboundary harm could arise even in situations where a State had complied with its international obligations relating to an activity that had been carried out under its jurisdiction or control. Such situations were not currently covered by international law, and the draft principles sought to fill that gap by providing that States should take all necessary measures to ensure the availability of prompt and adequate compensation for victims of transboundary damage caused by hazardous activities. As for the necessary domestic measures to be taken, his Government generally supported the set of procedural and substantive minimum standards identified in the draft principles.

55. His Government was generally satisfied with the consideration given to its comments, in particular by the Special Rapporteur, and the resulting changes in the draft principles. The commentaries had been significantly improved on second reading. Although his Government welcomed the improved text of the draft principle on international and domestic remedies, it was still not convinced that innocent victims were entitled to compensation only for damage that was significant. The attempt by the Special Rapporteur to question the validity of his Government's arguments had not changed its view. The wish to secure equal treatment of domestic and foreign victims of a single damage-causing event, the absence of a threshold in existing special civil liability regimes and the conceptual difficulties flowing from the transposition of the threshold of damage from international relations to transnational relations continued to provide a solid foundation for his Government's conviction that a threshold of damage should not be included in the draft principles.

56. He reaffirmed his Government's position that the final form of the work on the liability aspects of the topic should not be different from that of the work on the prevention aspects. The latter had taken the form of draft articles which might be used as the basis for a draft convention. As a minimum, the obligation of States to take the necessary measures to ensure that prompt and adequate compensation was available for victims of transboundary damage caused by hazardous activities should be incorporated into the draft articles on the prevention of transboundary harm from hazardous activities. That obligation could be supplemented by guidance in the form of principles, but the obligation should be spelled out as such so as to ensure that innocent victims of transboundary damage were not left uncompensated.

57. **Mr. Nesi** (Italy), welcoming the adoption of the draft articles on diplomatic protection, said that the topic was linked to that of the articles on responsibility of States for internationally wrongful acts. In particular, article 44 on State responsibility provided that the responsibility of a State might not be invoked if the claim was not brought in accordance with any applicable rule relating to the nationality of claims or if the claim was one to which the rule of exhaustion of local remedies applied and any available and effective local remedy had not been exhausted. Those two conditions had been elaborated on in the draft articles on diplomatic protection. Moreover, draft article 1 on diplomatic protection defined diplomatic protection as consisting in the invocation by a State of the responsibility of another State.

58. The links between the two sets of articles did not necessarily imply that the General Assembly should take the same action with regard to both. However, it seemed reasonable to postpone for one year any decision on whether an international convention on diplomatic protection should be adopted, until the General Assembly had had time to consider what course of action to take with regard to the articles on State responsibility.

59. His delegation welcomed the changes to the first-reading draft that, in accordance with the thrust of its own comments, enhanced the position of the protected individual. Those changes were consonant with developments that had taken place in related areas of international law. In the specific field of diplomatic protection, the traditional view that the State of nationality exercised its own right when it took up the case of one of its subjects could no longer be upheld. The draft articles and the related commentaries indicated a more modern approach.

60. Moreover, when individuals were injured in breach of an international obligation, they were not necessarily confined to the possibility of requesting diplomatic protection. Draft article 16 was therefore important as a reminder that diplomatic protection did not exclude resort to other forms of protection that might exist under international law. The reference to States in that article might give rise to ambiguity; it had to be read in the context of the commentary with regard to the invocation of responsibility by States other than the State of nationality when the obligation breached was owed to the international community as a whole or to a group of States. The latter case might involve an obligation under a human rights treaty to which both the responsible State and the claimant State were parties.

61. While the draft articles provided for diplomatic protection of refugees by a State other than the State of nationality, the conditions set out in draft article 8 greatly limited the scope of that innovation. Only in a few cases would the requirement that the refugee should be lawfully and habitually resident in the claimant State be met, particularly given the way in which the rule of continuity of nationality had been transposed to apply to refugees.

62. With regard to corporations, the changes to the first-reading text of draft article 9 could also be regarded as innovative in respect of existing international law. The new text provided a solution which was clearer than the one previously outlined by the Commission and avoided the risk of multiple claims in relation to a single injury affecting one corporation.

63. He welcomed the adoption, after many years of discussion, of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. They provided a useful list of the issues involved and of the measures that needed to be taken in order to protect potential victims, whether States or natural or legal persons. Draft principle 4 rightly emphasized the obligation of the operator to provide compensation, but it also provided for alternative solutions and, moreover, required that, if the various measures taken were insufficient to provide adequate compensation, the State of origin should also ensure that additional financial resources were made available.

64. As mentioned in draft principle 7, the principles would probably need to be implemented through global, regional or bilateral agreements with regard to particular categories of hazardous activities. However, the adoption of principles in a non-binding form, as suggested by the Commission, would be a useful step towards protecting those who suffered damage from hazardous activities.

65. *Mr. Onisii (Romania), Vice-Chairman, took the Chair.*

66. **Mr. Trauttmansdorff** (Austria) welcomed the adoption on second reading of the draft articles on diplomatic protection and the draft principles on international liability. With regard to the former, his delegation was not convinced that work on the elaboration of a convention should start immediately, as recommended by the Commission. The text that had been adopted on second reading had been elaborated in a relatively short time. It would therefore be beneficial for States to have time to digest it before coming to a conclusion on the most appropriate procedure. His delegation would prefer that the General Assembly should take note of the draft articles and place the item on its agenda again in a few years' time, so that the possibility of elaborating a convention by establishing an ad hoc or preparatory committee or convening a codification conference could be considered.

67. One issue that might need to be taken into account was the fact that the definition in draft article 1, which referred to the exercise of diplomatic protection only on behalf of nationals of a State, seemed inconsistent with draft article 8, which envisaged the possibility of a State exercising diplomatic protection in respect of persons other than its own nationals, such as stateless persons and refugees. Draft article 1, as it stood, might be taken to mean that invocation of the responsibility of a State by a State other than the State of nationality would not be

a case of diplomatic protection. That meaning was certainly not intended; the text might, therefore, need to be redrafted.

68. Draft article 15 might also require further consideration. The addition of paragraph (d), which stated that local remedies did not need to be exhausted where the injured person was manifestly precluded from pursuing local remedies, was reasonable, although the commentary rightly referred to the *lex ferenda* nature of the provision. In the modern world, where the rights of an individual could be affected even if that individual was at a great distance from the State committing the injury, the requirement to exhaust local remedies could raise insurmountable obstacles, even if the situations described in paragraphs (a) to (c) were not applicable. However, it was still necessary to consider whether the wording excluded a possible misuse of the exception in question.

69. His delegation supported the recommendation that the General Assembly should adopt a resolution endorsing the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. States should take the draft principles into account as recommendations when taking measures at the national and international levels.

70. However, the current text of the draft principles still contained a number of points that required further clarification. In draft principle 4, paragraph 1, it was not clear whether States were being requested to ensure compensation only for victims outside their territory or also those within their territory. In paragraph 2, the last sentence might need further clarification with regard to the scope of draft principle 3. Draft principle 4, paragraph 5, should be reconsidered in the light of the "polluter-pays" principle. In draft principle 5, paragraph (b), it remained unclear what kind of response measures were to be taken. The term "appropriate" did not add much clarity. Lastly, draft principle 8, paragraph 1, should be understood to mean that the draft principles were to serve as guidance to States when they adopted rules on liability at the national or international level.

71. The topics to be included in the long-term programme of work of the Commission should be chosen carefully in accordance with the selection criteria determined by the Commission, in particular the real needs of the international community in respect of codification and progressive development in a given area of international law. Those needs should be considered with a view to appropriate delimitation of the scope of the proposed topic.

72. His delegation supported the inclusion of the topic "Jurisdictional immunity of international organizations". As a host country of the United Nations and other international organizations, Austria believed that the practice of States in that field required harmonization. National courts needed more legal certainty when ruling on the immunity of international organizations. The inclusion of that topic would supplement the Commission's work with regard both to immunity and to international organizations. There was also some merit in considering the topic "Immunity of State officials from foreign criminal jurisdiction", which had recently come before the International Court of Justice on a number of occasions. The time seemed ripe to take stock of present practice and attempt to elaborate general rules on the subject.

73. With regard to other topics that had been proposed — "Protection of persons in the event of disasters", "Protection of personal data in transborder flow of information" and "Extraterritorial jurisdiction" — the Commission should carry out further preliminary studies, analysing the topics in the light of the above-mentioned selection criteria before deciding whether to include them in the work programme. Austria welcomed the preliminary analyses carried out by the Secretariat and contained in annexes C, D and E to the Commission's report. The analysis of the topic "Protection of personal data in transborder flow of information" showed the high level of interest of the increasingly globalized world in codification and progressive development of the international rules in that area. However, the question remained as to whether State practice in that field was as yet sufficiently consolidated in relation to ongoing rapid technological development. As to "Extraterritorial jurisdiction", because of its potential width, delimitation of the topic's scope was of paramount importance.

The meeting rose at 1.10 p.m.